No. 82-2029

In the Supreme Court of the United States

OCTOBER TERM, 1983

BARRY J. FAKIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's presentation of, and testimony concerning, a mortgage deed containing a false material statement constituted "use" of the document within the meaning of 18 U.S.C. 1623.

2. Whether petitioner's false statements were material.

3. Whether the district court erred in imposing cumulative sentences on petitioner for making a false statement and for using a document containing a false declaration.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1983. A petition for rehearing was denied on April 11, 1983 (Pet. App. C). The petition for a writ of certiorari was filed on June 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 1623(a) provides:

> Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses

any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of using a document containing a false material declaration in a proceeding before a grand jury, in violation of 18 U.S.C. 1623, and one count of making a false material statement to a grand jury, in violation of 18 U.S.C. 1623.[1] He was sentenced to consecutive terms of five years' imprisonment on each count. The court of appeals affirmed without opinion (Pet. App. B).

1. The evidence at trial showed that in March 1981 petitioner testified before a federal grand jury investigating possible tax fraud by Arlene Bykeefer, her husband Clark Dean, and their lawyer Jerome Pratt. Petitioner was summoned so that the grand jury could determine whether a purported $235,000 loan he had made to Bykeefer, secured by a mortgage deed, was genuine.

Prior to petitioner's appearance, IRS Agent David Siegwald advised the grand jury that the targets of the investigation were believed to have been involved in drug smuggling and had increases in their assets and expenditures that were not explained by their reported incomes. He also told the grand jury that public records showed that Bykeefer had received a $200,000 loan from petitioner, and that By-Gil, Inc., a company Bykeefer owned, had purportedly received

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[1]Petitioner was acquitted on two other counts of making false statements to the grand jury. The jury was unable to agree on a verdict on a third such count, and the government later moved to dismiss that count.

a $40,000 loan from Katherine Shymanski. Agent Siegwald explained that a bona fide loan did not constitute taxable income but that a sham loan could be used to disguise taxable income (12/2/80 G.J. Tr. 3-11).[2]

On March 3, 1981, petitioner testified before the grand jury under a grant of immunity (Tr. 108). He presented a note, dated July 15, 1978, reflecting a $235,000 loan he had made to Bykeefer. Attached to the note was a mortgage deed, also dated July 15, 1978, but not recorded until more than a year later (Gov. Exh. 2 at 5-6). Petitioner testified that he had made the loan as a result of inquiries from Ed Carter, a Florida businessman, who had told him that Jerome Pratt was seeking $200,000 to be used to finance a client's expansion of a home on Tampa Bay. When petitioner told Carter that he was interested in such an investment, Carter arranged for Bykeefer to fly to California to meet petitioner and sign the necessary documents (*id.* at 17-18, 20).

According to petitioner, he met with Bykeefer in Los Angeles on July 15, 1978. After they agreed to the terms of a loan, petitioner contacted a long time business associate who was to notarize the documents (Gov. Exh. 2 at 21-22, 24). Once the documents were notarized, petitioner gave Bykeefer a suitcase that contained $100,000 in cash (*id.* at 25-27). Petitioner testified that he made similar cash payments, in amounts of $50,000 on two occasions and $35,000 the third time, in December 1978, February 1979, and September 1979 (*id.* at 27-29). He claimed that the loan funds came from a cash hoard he had accumulated in an effort to conceal his assets from his second wife (*id.* at 41-47, 53-62,

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[2] "G.J. Tr." refers to transcripts of grand jury testimony. Agent Siegwald's testimony was introduced at trial outside the presence of the jury and was used by the trial court in ruling on the materiality of petitioner's statements before the grand jury.

68-69, 73-74, 76-77). However, petitioner testified that Bykeefer repaid the loan by check on a monthly basis (*id.* at 71).

In his testimony before the grand jury, petitioner denied that the mortgage deed and note had been backdated (Gov. Exh. 2 at 80; Pet. App. D). When he was asked to identify the witnesses' signatures that appeared on the deed, petitioner identified the signature of the notary and stated that the other two signatures on the deed were those of two persons in the notary's office (Gov. Exh. 2 at 84-85; Pet. App. D). However, at trial petitioner admitted that he had forged those two signatures, using the names of his former girlfriend and a neighbor (Tr. 826-830, 996-998). The two persons whose names petitioner had forged — Sharon Tompai and Jon Pettey —testified at trial that they had not witnessed the signing of the deed. In addition, they testified that after they had received grand jury subpoenas each separately contacted petitioner, who told them that he had signed their names because he needed extra witnesses (Tr. 421-424, 439-444).[3]

2. Petitioner's defense at trial was that his false statements concerning the witnesses to the deed were not material to the grand jury inquiry because Florida law does not require that a mortgage deed be witnessed. The district court rejected this claim, noting that it was significant to the grand jury to determine the authenticity of the deed and that the identity of the purported witnesses and whether they had in fact witnessed the document would be relevant to that inquiry, regardless of whether such witnesses were required as a matter of state law (Tr. 701).[4]

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[3]Tompai and Pettey were subpoenaed by the grand jury after petitioner's March 1981 grand jury appearance (Tr. 446, 652-653).

[4]See also Sent. Tr. 28-29 ("Sent Tr." refers to the transcript of petitioner's sentencing).

ARGUMENT

Petitioner concedes that his grand jury testimony concerning the witnesses to the deed was false. However, he contends that he did not "use" the mortgage deed within the meaning of 18 U.S.C. 1623 and that his statements were not material. He also contends that the district court erred in imposing consecutive sentences for the two counts on which he was convicted. These contentions are without merit. The rulings of the courts below are correct and do not conflict with the decision of any other court of appeals. Accordingly, further review is unwarranted.

1. Petitioner contends (Pet. 11-21) that he did not "use" the mortgage deed before the grand jury, but rather simply responded to the prosecutor's questions about it, and that his conduct therefore does not fall within the scope of 18 U.S.C. 1623. Petitioner primarily relies (Pet. 12-14, 19-20) on *United States* v. *Dudley*, 581 F.2d 1193 (5th Cir. 1978), in explaining his contention. But that case supports the decision below. In *Dudley*, a grand jury witness was shown four consulting contracts, one of which was a sham. She told the grand jury that those contracts were the only ones she had signed. After her grand jury appearance, the witness's attorney produced the true contract in place of the sham one about which the witness had testified. The witness contended that she did not "use" the document within the meaning of 18 U.S.C. 1623, because she did not physically present it to the grand jury, but merely responded to questions about it. 581 F.2d at 1197. The court rejected that contention, finding that physical presentation is not necessary so long as a witness falsely authenticates a document and tends to give verity to it. *Id.* at 1197-1198.

Here it is even clearer than in *Dudley* that there was "use" of the document in the grand jury proceeding. Petitioner presented the document in question to the grand jury, described the execution of the document, and referred to it repeatedly in answering questions about the loan to Bykeefer (see Pet. App. D). Petitioner himself was a key participant in the transaction reflected by the document and thus was clearly not a mere "records custodian." In attempting to convince the grand jury that the loan was genuine and that all parts of the mortgage deed were in order, although he in fact had forged the purported witnesses' signatures, petitioner clearly "used" a document containing a false declaration within the meaning of the statute. See *United States* v. *Dudley, supra*; *United States* v. *Pommerening*, 500 F.2d 92, 98 (10th Cir.), cert. denied, 419 U.S. 1088 (1974).

2. Petitioner also contends (Pet. 22-30) that his false statement concerning the "witnesses" was not material because the statement could not have influenced the grand jury's inquiry. As the district court observed (Sent. Tr. 28), that claim is specious in light of the record.

The grand jury was investigating the genuineness of petitioner's loan to Bykeefer. The validity of the mortgage deed was relevant to that determination because the deed was the only documentary evidence of the date of the purported loan. Petitioner's false answer clearly had the capacity to frustrate the grand jury's inquiry, since the presence on the deed of signatures of supposedly disinterested witnesses tended to confirm its validity.

In fact, petitioner appears to concede (Pet. 26-27) that his statements were within the scope of the grand jury's inquiry and had the capacity to affect it. He nonetheless contends (*id.* at 27-28) that his false statements were not material because truthful answers would not have aided the grand jury's investigation. But petitioner ignores the fact that if he

had testified truthfully that he had forged the witnesses' signatures, the grand jury would have had more reason to doubt the validity of the deed and might well have chosen to question other witnesses about the loan and to pose additional questions to petitioner.[5] Thus, petitioner's false statements clearly were material. See *United States* v. *Ostertag*, 671 F.2d 262, 264-265 (8th Cir. 1982); *United States* v. *Cosby*, 601 F.2d 754, 756 (5th Cir. 1979).[6]

3. Finally, petitioner contends (Pet. 31-34) that the district court erred in imposing consecutive sentences because his false declaration before the grand jury and use of a document containing a false declaration constituted a single act. This contention is without merit. The false use count (Count I) was addressed to petitioner's use of a document containing a false declaration that Tompai and Pettey had witnessed the deed. The false statement count (Count II) was addressed to petitioner's false answer that the "witnesses" worked in the notary's office. Different evidence was used to prove the two offenses. The first count was proved by reference to petitioner's statements about the manner in which the deed had been executed, while the second was proved by reference to his statements identifying the "witnesses." Cumulative sentences are clearly permissible under such circumstances. See *United States* v. *Molinares*, 700 F.2d 647, 653 (11th Cir. 1983); *United States*

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[5]A grand juror testified at trial that, because the grand jury was investigating the authenticity of petitioner's loan to Bykeefer, the existence of the two witnesses to the deed was relevant to the grand jury's inquiry into backdating of the loan documents (Tr. 164-165, 169, 173).

[6]*United States* v. *Mancuso*, 485 F.2d 275 (2d Cir. 1973), on which petitioner relies (Pet. 27), does not support his contention. *Mancuso* merely held that the test for determining materiality is whether a "truthful answer could conceivably have aided the grand jury investigation." 485 F.2d at 281 & n.17. Because a truthful answer by petitioner could have led the grand jury to make further inquiries about the loan, the decision in this case is consistent with *Mancuso*.

v. *De La Torre*, 634 F.2d 792, 795 (5th Cir. 1981); *United States* v. *Williams*, 552 F.2d 226, 228 (8th Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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